

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
LAS VEGAS, NEVADA

KABINS FAMILY LIMITED)
PARTNERSHIP, et al.,) Docket No. 2:09-CV-1125-GMN-RJJ
)
Plaintiffs,)
)
vs.)
)
CHAIN CONSORTIUM, et al.,)
) Las Vegas, Nevada
Defendants.) May 4, 2011
) 11:38:13 a.m.
)
And related cases and parties)

HEARING RE: OBJECTIONS DURING DEPOSITION

THE HONORABLE ROBERT J. JOHNSTON PRESIDING
MAGISTRATE JUDGE OF THE U.S. DISTRICT COURT

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2:09-CV-1125-GMN-RJJ Kabins v. Chain Consortium 5/4/11 **Hearing**

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APPEARANCES:

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(Continued)

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APPEARANCES:

FOR THE DEFENDANTS:

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1 LAS VEGAS, NEVADA

WEDNESDAY, MAY 4, 2011

2 PROCEEDINGS BEGAN AT 11:38:13 A.M.

3 * * * * *

4 THE COURT: Please be seated.

5 THE CLERK: Kabins Family Limited Partnership versus
6 Chain Consortium, et al., 09-Civil-1125-GMN-RJJ.

7 THE COURT: Thank you.

8 Counsel, please enter your appearances for the
9 record. Starting with plaintiffs' counsel. If you indicate
10 the party or parties you represent and any law firm you're
11 associated with so the clerk can capture that information for
12 the record.

13 MS. LOWRY: J. D. Lowry, Your Honor, from Dickinson
14 Wright on behalf of Kabins Family Limited Partnership now
15 doing business as Kabins Family, LLC, and Lori C. Kabins as
16 trustee for the Lori C. Kabins separate property trust.

17 I'm also here representing Dr. Kabins as an
18 individual for his deposition today.

19 THE COURT: Thank you.

20 MR. SPILOTRO: Thank you, Your Honor.

21 THE COURT: Mr. Spilotro.

22 MR. SPILOTRO: John Spilotro on behalf of Dr.
23 Kabins, Your Honor. Usually my role here is pretty limited
24 and it has to usually do with the criminal prosecution that
25 was in this courthouse in front of the Honorable Judge

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1 Quackenbush, but that being said, some of the issues came up
2 so I had to pipe in a little bit, so.

3 THE COURT: Very good. That's fine. Thank you.

4 MR. MASSI: Good morning, Judge.

5 THE COURT: On the defense side. Mr. Massi.

6 MR. MASSI: Al Massi for Benessere, LLC; Cipriani,
7 LLC; and Gila Bend, LLC along with Mr. Bowers, Chad Bowers.

8 THE COURT: Thank you.

9 MR. SKAGGS: Good morning, Your Honor. William
10 Kerry Skaggs on behalf of Defendants Gabriel Martinez, 99th
11 Indian School, LLC; 99th & Indian School Management, LLC;
12 Capri I, LLC; Capri II, LLC; and Phoenix 83rd, LLC.

13 I know that the Court had requested attorneys only
14 but with the Court permission, my law clerk, Bridget Foley-
15 Peak [phonetic] is here. If she could attend for educational
16 purposes?

17 THE COURT: That's fine.

18 MR. SKAGGS: Thank you.

19 MS. JOHNSTON: Good morning, Your Honor. Barbara
20 Johnston, Bar Number 3748. I represent Eddy Gutzman, III;
21 G. E. Gutzmann, III; Cipriani Benefit; and Cipriani
22 Management; Benessere Management; and Gila Bend Management on
23 behalf of Eddy Guzman.

24 THE COURT: Thank you.

25 MR. LOVATO: Good morning, Your Honor. Mario

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1 Lovato of Lovato Law Firm on behalf of two defendants. One
2 is Todd W. Bergman and the other one using his initials is
3 TWB Enterprises.

4 THE COURT: Thank you.

5 MS. ZASTROW: Good morning, Your Honor. Lisa
6 Zastrow with Kaempfer Crowell representing the third party
7 defendants, Jim Main and Main Amundson Associates.

8 THE COURT: Thank you. Is that everyone? Very
9 good.

10 MR. MASSI: Judge -- yes, Your Honor.

11 THE COURT: What's -- who's -- I understand there's
12 a dispute in the course of the taking of the deposition?
13 Who's the deponent today?

14 MR. MASSI: Dr. Kabins, Your Honor.

15 THE COURT: Okay. And what's the issue?

16 MR. MASSI: Your Honor, you recall having been
17 subjected to this for the last year or so. Some difficulty
18 -- the difficulties we had with the last deposition, and a
19 lot of it arose as a result of claims of attorney/client
20 privilege and the extent to which we could go. And we've
21 gotten through a lot of it this morning relatively well, but,
22 Dr. Kabins has, as a matter of course either doesn't know or
23 now has started to rely, we believe, on the attorney/client
24 privilege and we just want to find out if we're right or
25 wrong. And by "we" I mean me.

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1 THE COURT: Okay.

2 MR. MASSI: And let me ask you, if I may to indulge
3 me, and I'll tell you -- give you an impression of at least
4 three of the questions I've asked and their areas. I -- as I
5 said, I represent the three LLCs: Gila Bend, Benessere, and
6 Cipriani. I've asked Dr. Kabins, understanding the
7 background of some things that managers did inappropriately,
8 I asked, what did the LLCs -- what in your opinion, you
9 personally, your personal knowledge, what did the LLCs or the
10 members -- or the individual members of the LLCs do wrong?

11 The second thing I asked was -- another thing I
12 asked I should say is, what, if any, monetary damages, the
13 amount of your damages, what, if any, monetary damages have
14 you sustained as a result of any actions or activity by the
15 three LLCs that I represent?

16 And then I also asked -- Dr. Kabins has been
17 convicted or pled guilty to felony -- [unintelligible] a
18 felony under this [unintelligible] and I -- subject of Mr.
19 Bergman who is a party defendant in this case, he sold to the
20 hospitals equipment Dr. Kabins used. I asked in conjunction
21 -- or as an outgrowth of that, I understood that he lost
22 privileges at hospitals in Las Vegas as a result of his
23 conviction and in fact the right to do Medicare/Medicaid
24 patients. That was objected to based on the lack of
25 relevance, the question was certified and he was told not to

1 answer.

2 THE COURT: So was the question, did you lose
3 privileges anywhere?

4 MR. MASSI: Lose privileges at the hospital.

5 THE COURT: And then where?

6 MR. MASSI: Yes. And my thought process, Judge,
7 was he still does business with that supplier as I understand
8 it that Mr. Bergman is the purveyor for the supplier. I
9 wanted to know if he lost privileges why is he still doing
10 business with him? Is he doing business with him because of
11 any agreement he had with Mr. Bergman, side agreement, et
12 cetera? I need -- I wanted to know some of the background on
13 why he is still doing business with the company that he is
14 suing now and obviously claims damages from it.

15 But I -- the more important issues to me, Judge,
16 are, -- I understand and I don't want to ever broach the
17 attorney/client privilege, but I can't allow voluntarily
18 Mr. Kabins to continue to use it as a shield to every
19 question.

20 THE COURT: Okay.

21 MR. MASSI: That every conversation with his
22 attorney means that he can raise it as an objection to
23 virtually every question I ask. And that's where I need the
24 direction and I thank you for it.

25 THE COURT: Okay. Thank you.

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1 Ms. Lowry, did you want to speak to this?

2 MS. LOWRY: I do, please.

3 With respect to the attorney/client privilege
4 issues, the questions that have been at issue -- and we
5 actually brought the court reporter in to read those back if
6 the Court would like to hear those as they were specifically
7 asked --

8 THE COURT: Is Mr. Massi's memory weak on the
9 questions asked?

10 MS. LOWRY: I believe it would be helpful for the
11 Court to know what the actual questions were that had been
12 asked.

13 THE COURT: If the questions were as he framed them
14 here in court would they be all right and could they be
15 answered?

16 MS. LOWRY: I am not sure what you mean by the
17 questions "as he framed them here."

18 THE COURT: Well, the first question is, what did
19 the LLCs or members of them do wrong?

20 MS. LOWRY: And I believe Dr. Kabins answered that
21 with respect to Dr. Kabins' personal knowledge obtained
22 independently of counsel. But what -- what we're objecting
23 to is specifically to the extent that Dr. Kabins knows the
24 facts, only from having been told those facts by counsel and
25 the result of an invest -- an investigation by counsel that

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1 didn't include Dr. Kabins personally, then his -- his
2 knowledge of that must necessarily be the outgrowth or the
3 result of privileged attorney/client community.

4 A comparable example --

5 THE COURT: Now wait a second. What's the reason
6 for the communication?

7 MS. LOWRY: That Dr. Kabins went to an attorney and
8 asked, did anything wrong happen here or --

9 THE COURT: Okay. Let me take the next step then.
10 When do you eventually release that information to the
11 defendants?

12 MS. LOWRY: The defendants have the ability to
13 request, through written discovery prior to trial what --
14 what position Kabins Family Limited Partnership and Lori C.
15 Kabins as trustee of the Lori C. Kabins Separate Property
16 Trust will be taking at trial and what their evidence is in
17 support of that?

18 THE COURT: Wait a second. Wait a second. You
19 got a lawsuit here, Dr. Kabins alleging that some things
20 were done wrong, right?

21 MS. LOWRY: Correct.

22 THE COURT: Okay. And somebody says, what was done
23 wrong? I don't care where he gets the information. If he's
24 got information and he's got an opinion about that, he needs
25 to give it.

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1 MS. LOWRY: Even -- but, Your Honor, what we're
2 looking at though is a situation where --

3 THE COURT: You're trying to say that because you
4 did the investigation or an investigator did it and gave it
5 to you and then you talked to him about it and said, here's
6 what we're going forward on the lawsuit. He's the client.
7 He made the decision he's going to sue on this basis, they
8 have a right to know what it is. And I'm not going to play
9 any games with you and force them to file interrogatories or
10 other requests for information. The guy's under oath, let
11 him answer. If he knows the answer, he should answer.
12 That's not privileged. That takes care of the first one.

13 The second question, what are the monetary damages?
14 Where's the attorney/client privilege in that?

15 MS. LOWRY: If the monetary damages were something
16 that were calculated and assessed on an independent basis by
17 the attorneys and Dr. Kabins wasn't a part of that process --

18 THE COURT: So you've already disclosed that, I
19 assume as part of your 26(a) disclosures?

20 MS. LOWRY: The -- I can't speak to that for
21 certain, Your Honor.

22 THE COURT: Well, did you or did you not? Doesn't
23 Rule 26(a) say under your initial disclosures you've got to
24 give the damages and the damage information?

25 MS. LOWRY: If --

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1 THE COURT: Was it given or wasn't it?

2 MS. LOWRY: I don't know off the top of my head,
3 Your Honor.

4 THE COURT: So you're in violation of 26(a) in the
5 initial disclosures?

6 MS. LOWRY: It's very likely that what -- what was
7 stated in the initial disclosures was what was known at the
8 time pending further discovery.

9 THE COURT: And what's the -- what's the
10 responsibility to update that information? And you don't do
11 it on the last day of discovery, right?

12 MS. LOWRY: That's correct. But --

13 THE COURT: So does he have no knowledge about what
14 his damages are in this case?

15 MS. LOWRY: Only to the extent that we've told him.

16 THE COURT: Fine. He can answer that question.
17 Let's go to the third one then.

18 What facilities or where has he lost medical
19 privileges? What's -- where's the privilege in that?

20 MS. LOWRY: There's -- we're not asserting a
21 privilege with respect to that. I believe, Your Honor, that
22 Mr. Massi was pursuing that line of questioning to
23 effectively harass Dr. Kabins. There's -- there's no --

24 THE COURT: Well, no, it's not harassment. It's
25 information that's background just like asking if he had a

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1 medical degree at some point as part of his education,
2 right?

3 MS. LOWRY: Your Honor, it's --

4 THE COURT: Isn't it?

5 MS. LOWRY: -- it's difficult for me to imagine how
6 the privileges at which doctor -- or the hospital --

7 THE COURT: Okay. Okay, so the objection is whether
8 or not it's relevant. Under Rule 30, if the objection is
9 relevance what do you do at a deposition?

10 MS. LOWRY: You make the objection and preserve it
11 for the record.

12 THE COURT: And answer the question, right?

13 MS. LOWRY: And --

14 THE COURT: Good. That answers that one.

15 Now the only other thing that's kind of tagging
16 along is whether or not there's some side arrangement or
17 continuing dealing with Bergman.

18 MS. LOWRY: And -- and --

19 THE COURT: Where's the privilege in that?

20 MS. LOWRY: -- but, Your Honor, that -- that isn't
21 -- I disagree that wasn't a question that we --

22 THE COURT: It may not have been.

23 MS. LOWRY: -- had an issue about and it was
24 answered.

25 THE COURT: It may have been an extension of where

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1 he's going with this.

2 MS. LOWRY: And Dr. Kabins answered the question.

3 THE COURT: Is that going to be a problem?

4 MR. SPILOTRO: No.

5 THE COURT: Is that going to be a problem? Okay.

6 MS. LOWRY: I don't --

7 MR. SPILOTRO: Your Honor --

8 THE COURT: Mr. Spilotro, you want to jump in?

9 MR. SPILOTRO: -- if I may? Maybe I -- maybe I can
10 clarify a little bit of that.

11 THE COURT: Well, you're present to advise Mr.
12 Kabins because you represented him in the criminal -- or did
13 represent him in the criminal case.

14 MR. SPILOTRO: Correct. And what I'm going to say
15 is this. You know they went into the privileges. At first
16 -- I mean obviously it was -- the way -- you have to
17 understand the time line. There were investments made in
18 '04, the lawsuit was filed in '09, any privileges Dr. Kabins
19 lost we're talking about in 2010. It's long after the fact.
20 So when Mr. Massi asked that line of question, I said, oh,
21 if you're worried about bias that he's feeding him business,
22 just ask that question. Which Mr. Massi did ask. Dr. Kabins
23 answered it and said, no, I haven't been doing business.

24 THE COURT: Okay.

25 MR. SPILOTRO: In my view it should have ended

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1 there and the caveat is this, Your Honor, to the extent in
2 that's the criminal case, Your Honor is well aware there was
3 a plea, and however that plea, although it precluded maybe
4 the federal government from any further prosecution, it
5 doesn't preclude a state government or any other entity of
6 doing it. So he still has his Fifth Amendment attach [sic].

7 THE COURT: We -- we all -- we all understand.

8 MR. SPILOTRO: And that's been litigated in this
9 courthouse in front of Judge Navarro, Judge Leen, and I don't
10 want to -- and the Supreme Court teachings on this are very
11 clear. On Fifth Amendment privileges I have to be very
12 careful to object early enough so as not to -- to create a
13 waiver.

14 THE COURT: But, Mr. Spilotro, let me interrupt
15 you --

16 MR. SPILOTRO: Yes.

17 THE COURT: -- cause I haven't heard that there was
18 an objection based on Fifth Amendment.

19 MR. SPILOTRO: No, not -- not yet, but I was afraid
20 -- I understand.

21 THE COURT: I'm not worried about it then.

22 MR. SPILOTRO: No.

23 THE COURT: You can raise -- Dr. Kabins can raise
24 it at --

25 MR. SPILOTRO: Correct.

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1 THE COURT: -- the appropriate time. And there's
2 law that tells you how you treat that in the civil case,
3 right?

4 MR. SPILOTRO: I appreciate that, Your Honor. Yes.

5 THE COURT: So that answers that question.

6 MR. SPILOTRO: But the other --

7 THE COURT: Is there anything else left?

8 MR. SPILOTRO: No, the only thing I wanted to note
9 for Your Honor was this though.

10 THE COURT: Okay.

11 MR. SPILOTRO: To the extent that damages and that
12 sort of thing, because we're talking about large amounts of
13 money, to the extent any damages would have been calculated
14 say, you know, by a -- an accountant or other or forensic
15 people, know this, Your Honor, this is the first bit of
16 discovery in this whole case.

17 THE COURT: Okay.

18 MR. SPILOTRO: Just -- I, you know, there are other
19 -- there are also other discovery needs [sic], you know, to
20 the extent the -- you know, they complain if the witness
21 doesn't know. That's all.

22 THE COURT: One of which is Rule 26(a), initial
23 disclosures.

24 MR. SPILOTRO: No. And I -- I appreciate that,
25 Your Honor.

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1 THE COURT: So, you know, that's pretty
2 straightforward. Anything further?

3 UNIDENTIFIED SPEAKER: Yes, Your Honor, one
4 additional thing. During his deposition we're seeing two
5 sets of civil objections being made by the two attorneys for
6 Kabins at the same time, essentially tag teaming on that.

7 THE COURT: Who's making objections?

8 UNIDENTIFIED SPEAKER: Both of the attorneys on
9 plaintiffs side and they're generally civil objections.

10 THE COURT: Mr. Spilotro -- wait a second -- Mr.
11 Spilotro, are you making objections?

12 MR. SPILOTRO: I did log an objection only as to an
13 attorney/client privilege.

14 THE COURT: You shouldn't be speaking. You're not
15 counsel of record in this case. You're going to work through
16 Ms. Lowry if you've got anything to say in that deposition
17 otherwise I'll just exclude you.

18 MR. SPILOTRO: Okay. That'll be fine, Your Honor.

19 THE COURT: All right?

20 MR. SPILOTRO: Not a problem.

21 THE COURT: And then if your client has a problem
22 he can come out and consult with you, just like he does at
23 the grand jury or anywhere else, but --

24 MR. SPILOTRO: No. Then that's fine, Your Honor.

25 THE COURT: -- I don't want you impeding the

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1 progress.

2 Was there anything else?

3 UNIDENTIFIED SPEAKER: No, Your Honor.

4 THE COURT: Okay. Ms. Lowry, anything further?

5 MS. LOWRY: No, Your Honor.

6 THE COURT: Okay. Good. Sounds like you're back
7 on track then.

8 MR. MASSI: Yes, sir.

9 MS. LOWRY: Thank you, Your Honor.

10 MR. SPILOTRO: Thank you, Judge.

11 UNIDENTIFIED SPEAKER: Thank you, Your Honor.

12 THE COURT: Be sure and take a lunch break, I don't
13 want anybody to collapse in the midst of all this work.

14 MR. MASSI: Thank you very much for your time,
15 Judge.

16 THE COURT: We'll be in recess.

17 THE CLERK: All rise.

18 (Court recessed at 11:52:49 a.m., until 1:51:28 p.m.)

19 THE CLERK: Please rise.

20 THE COURT: Please be seated.

21 THE CLERK: Kabins Family Limited Partnership, et
22 al. versus 3900 LLC, et al., 2:09-CV-1125-GMN-RJJ.

23 THE COURT: Thank you.

24 Counsel, please enter your appearances for the
25 record, starting with plaintiffs' counsel, please.

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1 MS. LOWRY: J. D. Lowry, Your Honor of Dickinson,
2 Wright for the named plaintiffs whom -- whose names I won't
3 repeat in full here.

4 THE COURT: That's fine.

5 MS. LOWRY: And Dr. Kabins individually today for
6 the deposition.

7 THE COURT: Thank you.

8 And the defense?

9 MR. MASSI: Al Massi for Benessere, Gila Bend, and
10 Cipriani, LLC, Your Honor.

11 THE COURT: Thank you.

12 MR. SKAGGS: William Kerry Skaggs, Your Honor, for
13 Defendant Gabriel Martinez and several other entities, I hope
14 I can recall from memory but Capri I, LLC.

15 THE COURT: That's okay. We've got the earlier
16 record --

17 MR. SKAGGS: Thank you, Your Honor.

18 THE COURT: -- so we'll treat this as a
19 continuation.

20 MR. SKAGGS: Thank you.

21 MS. JOHNSTON: Barbara Johnston on behalf of Eddy
22 Guzman and his various business entities.

23 THE COURT: Thank you.

24 MR. LOVATO: Mario Lovato on behalf of Defendant
25 Todd W. Bergman and TWB Enterprises.

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1 THE COURT: Thank you.

2 MS. ZASTROW: Lisa Zastrow, Your Honor, with the
3 third-party defendants named as produced [unintelligible].

4 THE COURT: Thank you.

5 MR. BOWERS: Chad Bowers, Your Honor, here with Mr.
6 Massi.

7 THE COURT: Thank you.

8 I understand there's another dispute.

9 MR. MASSI: Yes, Your Honor. I was --

10 THE COURT: Who wants to tell me what it is or frame
11 the issue?

12 MR. MASSI: I was starting to recommence the
13 deposition at approximately 1:35 when counsel advised that
14 on behalf of Dr. Kabins that it was her intention, on his
15 behalf to appeal your earlier decision, your decision this
16 morning, to Judge Navarro and/or further. At which point I
17 represented to her that I felt that your decision was the --
18 presently the law, but I didn't say the law of the case in
19 my response but I -- your decision was appropriate. That if
20 she wanted to object that I would go forward with the
21 deposition based on your decision with the understanding that
22 she could preserve her objection allowing her to take her
23 appeal to wherever she wants. Segregating that part of the
24 deposition if necessary and having subject to being struck if
25 Judge Navarro or the Ninth Circuit agreed with her position.

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1 She didn't feel, apparently, that that was an appropriate
2 tactic and so we're back before you for your determination.

3 THE COURT: Okay. That's fine.

4 Ms. Lowry, what's the -- what's the position here?

5 MS. LOWRY: Your Honor, with all due respect we do
6 disagree with your ruling and --

7 THE COURT: Certainly, that's okay. That happens
8 from time to time.

9 MS. LOWRY: But our position --

10 THE COURT: There's -- and there's a procedure in
11 place to deal with that.

12 MS. LOWRY: Indeed. And our position is that --
13 and note that we're all here today in the courthouse. I
14 don't have access to, for example, my computer where I can do
15 legal research here on the fly. I think, at a minimum, this
16 is an issue that the parties should be afforded an
17 opportunity to brief out, just to go ahead and get that out
18 in front of you. But my very strong concern with Mr. --

19 THE COURT: Let me -- let me do this. Let me do
20 this because I think the rules are very clear how to deal
21 with this. I don't think there's a big decision that I have
22 to make here. Really you and your client have to make the
23 decision.

24 From my understanding of what's been framed, we
25 have a situation where you disagree with my decision.

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1 There's no automatic appeal of that. Obviously that decision
2 never goes to the Ninth Circuit Court of Appeals until the
3 case is over. You can take it to the District Court Judge
4 and there's a rule and a provision under 28, U.S.C., 636 to
5 appeal that and the local rule provides how to do that as
6 well.

7 So, all we need to do is go back to the rule and
8 we get the information that we need to advise us going
9 forward, and then you and your client have the decision to
10 make, okay? You're familiar with Rule 30?

11 MS. LOWRY: I am, Your Honor, but I --

12 THE COURT: So that would put you, I assume, under
13 Rule 30 subsection (c)(2) which deals with objections. It
14 reads as follows:

15 "An objection at the time of the examination
16 whether to evidence, to a party's conduct, to the
17 officer's qualifications, to the manner of taking
18 the deposition or to any other aspect of the
19 deposition must be noted on the record, but the
20 examination still proceeds. The testimony is taken
21 subject to any objection. An objection must be
22 stated concisely in a non-argumentative and non-
23 suggestive manner."

24 Here's where we get to the meat and potatoes.

25 "A person may instruct a deponent not to

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1 answer, only when necessary to preserve a privilege
2 to enforce a limitation ordered by the court" --
3 there is none in this case -- "or to present a
4 motion under Rule 30(d)(3)." End quote.

5 So it looks like the first thing that has to happen
6 is if there's an objection here, which I'm assuming we're
7 back to claim of privilege --

8 MS. LOWRY: Yes, Your Honor.

9 THE COURT: -- all you have to do is instruct your
10 client not to answer. Have you done that?

11 MS. LOWRY: Not yet, I -- because this is my
12 concern, Your Honor, and with all due respect, I believe --
13 and again, I'm not able to do legal research here but I
14 actually have looked at this relatively recently. I believe
15 that there's a recent Ninth Circuit case that indicates that
16 specifically with respect to issues related to the
17 attorney/client privilege, if there's a potential that a
18 witness may be compelled to breach the attorney/client
19 privilege, that is something that is actually appealable and
20 [unintelligible] --

21 THE COURT: Well, that's to the Ninth Circuit.

22 MS. LOWRY: Okay.

23 THE COURT: I just gave you my opinion on what I
24 thought the law was. You can take it anywhere you want to.
25 That's okay. All I'm saying is here's the procedure of how

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1 we go forward today.

2 So I'm assuming your claim is privilege here on
3 behalf of your client. You will instruct your client not to
4 answer and that will end it.

5 MS. LOWRY: Okay.

6 THE COURT: You'll take the appropriate then,
7 challenge to my decision to the District Court Judge.

8 Now, the other option that you have available is a
9 reference here to Rule 30(d)(3). 30(d)(3) deals with motion
10 to terminate or limit the taking of the deposition.

11 Subsection (a) grounds:

12 "At anytime during the deposition the deponent
13 or a party may move to terminate or limit it on the
14 ground that it is being conducted in bad faith or in
15 a manner that unreasonably annoys, embarrasses or
16 oppresses the deponent or party. The motion may be
17 filed in the Court where the action is pending or
18 the deposition is being taken" -- same jurisdiction
19 in this case -- "if the objecting deponent or party
20 so demands the deposition must be suspended for the
21 time necessary to obtain an order."

22 I would assume we're not there, right?

23 MS. LOWRY: Correct, Your Honor.

24 THE COURT: This is only claim of privilege. So
25 the only thing that's left is you do drop down and an award

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1 of expenses is a potential here under Rule 37(a)(5) in the
2 end as -- as this thing moves forward. And I just mentioned
3 that because I think you may want to be aware of that as you
4 go forward.

5 MS. LOWRY: Understood, Your Honor.

6 THE COURT: Okay. All right.

7 So do I need anything further on the record today?

8 MR. MASSI: Your Honor, if I might please --

9 THE COURT: Yes.

10 MR. MASSI: -- on behalf of at least my clients.

11 It would then be my position that many of the
12 questions I was going to ask -- and I really didn't have a
13 whole lot more than this, but many --

14 THE COURT: Yes.

15 MR. MASSI: -- of the questions I had to ask there
16 was going -- there were going to be questions following
17 [unintelligible]. Obviously if you'll recall from this
18 morning one was about damages, one was what he knew that my
19 clients did wrong, and I have --

20 THE COURT: Right.

21 MR. MASSI: -- a short series of questions on each
22 after. I don't want to ask -- I can't get to those without
23 knowing the answer to these. So --

24 THE COURT: Right.

25 MR. MASSI: -- but we're here and it was difficult

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1 to arrange the schedule for everyone --

2 THE COURT: I can understand.

3 MR. MASSI: -- and we truly want to get through
4 this deposition at least in my lifetime, which may or may
5 not be long or short.

6 THE COURT: You look pretty good today, Mr. Massi,
7 so.

8 MR. MASSI: Thank you, sir. But -- so for that
9 reason I would ask if -- I don't want to go forward with the
10 deposition and come back and have to redo what we've done.
11 Counsel wanted to suspend it. I don't want to suspend it
12 but if I need to do that I would ask your permission, (a) to
13 have it reconvened if the Court -- regardless of whether the
14 Court -- Judge Navarro agrees or disagrees with you,
15 reconvening -- convene -- could not use my mouth in my work
16 -- in the same manner as we're doing it today here, so we
17 can bother you periodically if we need it, at a time
18 convenient to the Court and the parties. And (2) if I might
19 not be available when it reconvenes, depending on the time
20 the order gets, allowing Mr. Bowers to continue the
21 deposition in my stead.

22 MS. LOWERY: And we don't have any objection to any
23 of that, Your Honor.

24 THE COURT: Okay. That's fine.

25 MR. MASSI: Thank you. And again, I speak only for

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1 myself, Judge. I don't know what everybody else's intention
2 is today.

3 THE COURT: Yeah. I'm just a very practical
4 person, you know. You know, my attitude would be everybody
5 is here, get everything done that you can. You know, and
6 even -- even the objection in regard to damages, you know,
7 what the monetary damages are and the objection is that the
8 information that the deponent has is attorney/client
9 privilege.

10 See, I can't comprehend how that's ever going to
11 be attorney/client privilege and how it's not going to come
12 out. In fact, you know, it's an initial disclosure
13 requirement. There's a supplement requirement. I've got to
14 believe there's -- if there's not an interrogatory or written
15 request there soon will be one. It just, to me, this seems
16 like a frivolous objection but, you know, that's my opinion
17 and you'll be able to take that up from here.

18 Also, there's no reason to instruct the client not
19 to answer the question. Let the question -- let the client
20 answer what he knows and get it done. I mean he must know
21 something about what his damages are that did not come from
22 the attorney. Either that -- well, I'm not going to cast
23 aspersions. The doctor can say what he wants to say and you
24 can say what you want on behalf but that's just my
25 observations.

1 Again, I may be much too practical for you, Ms.
2 Lowry, and that's okay.

3 MS. LOWRY: No.

4 THE COURT: But you've -- you know what the rule
5 is. Please don't act like your praying again and bowing.

6 MS. LOWRY: Oh, I'm so sorry. That -- just
7 something --

8 THE COURT: It's just not appropriate.

9 MS. LOWRY: -- to do with my hands. I'm so sorry.

10 THE COURT: I understand but you put your hands
11 together and you -- in a praying motion and bow toward me.
12 It's very awkward. I'm not deity and there's no divine
13 leadership up here today, just the Federal Rules of Civil
14 Procedure 30.

15 MS. LOWRY: My apologies, Your Honor.

16 THE COURT: Okay? We'll be in recess.

17 MR. MASSI: Thank you, Judge.

18 MS. JOHNSTON: Your Honor, may I bring up an issue?

19 THE COURT: Oh, excuse me. Ms. Johnston, yes.

20 MS. JOHNSTON: May I be heard?

21 THE COURT: Yes.

22 MS. JOHNSTON: I would like to proceed with my
23 questions today. I haven't touch on any of those issues
24 that I believe would be attorney/client privilege in terms
25 of what Dr. Kabins may say and I would like to proceed with

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1 that -- the Court's already --

2 THE COURT: I'll leave that to you and Ms. Lowry.

3 MS. JOHNSTON: Okay.

4 THE COURT: I mean, you know, I've read the rule.
5 I've indicated that sanctions under 37 could kick in. I just
6 add that as a caution. Like I say, I'm just a practical
7 person.

8 MS. JOHNSTON: Understood. Thank you, Judge. I
9 appreciate it.

10 THE COURT: You know, I've been doing this for,
11 you know, 23 years. I was a litigator in Federal Court for
12 many years before that, and I just -- I take that approach
13 to things. But we are guided by the rules and Ms. Lowry and
14 her client can make their decision as they feel is
15 appropriate.

16 MR. MASSI: Thank you, Judge.

17 ALL: Thank you.

18 THE COURT: Okay.

19 MR. MASSI: Thanks again for your time.

20 THE COURT: We'll be in recess.

21 PROCEEDINGS CONCLUDED AT 2:03:25 P.M.

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